BANK OF CHINA

v.

NGAN CHING WEN (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8-22-334-2001]
6 SEPTEMBER 2005

CIVIL PROCEDURE: *Striking out - Counterclaim - Whether disclosing no reasonable cause of action - Banking facilities - Secured upon charge of shares - Whether chargee owed duty of care to chargor - Whether bound to sell shares when market was good - Rules of High Court 1980 O. 18 r. 19*

The plaintiff bank had filed a claim against the defendant in respect of banking facilities granted to the latter that was secured upon a charge of shares, and had obtained a summary judgment under O. 14 Rules of the High Court 1980 ('RHC'). The defendant alleged that the plaintiff had failed to dispose of the shares when the market was good, thereby resulting in the outstanding facilities, and in the circumstances, lodged a counterclaim against the plaintiff. The learned Senior Assistant Registrar ('SAR') found the counterclaim to be devoid of any reasonable cause of action, and for that reason struck out the same under O. 18 r. 19 of the RHC. The defendant appealed and argued, essentially, that the plaintiff owed him a duty of care as to the timing of the sale of the shares. According to the defendant further, such duty of care was not subject to the four corners of the Memorandum of Charge, but extended beyond that, such that the plaintiff was bound to mitigate losses and liquidate the shares in 1998 when the share market was not so depressed. The plaintiff contended that as mortgagee of the shares it owed no such duty to the defendant and was at liberty to exercise its rights against the securities.

Held (dismissing the appeal):

[1] The plaintiff as mortgagee and chargee of the shares owed no duty of care to the defendant as to the timing of the sale of the shares. Consequently, the plaintiff had the right to determine when to sell the security to realise the outstanding amount. This was its contractual right. The defendant, however, could demand for the shares to be sold which must be heeded by the plaintiff. (p. 40 f-i)

[2] On the facts, there was no evidence to show that the plaintiff had been negligent in so far as the disposal of the security is concerned. The plaintiff had done all that was necessary in disposing of the security. In fact, some of the pledged shares were sold on the instruction of the defendant himself earlier. (p. 41 c)

[3] The issues raised by the defendant about the involvement of a third party and the alleged consequential variation in the terms of the memorandum of charge was lacking in precision and inconsistent with the undisputed contemporaneous documents. The appeal is hence dismissed and the counterclaim struck out with costs. (p. 41 h)

[Order accordingly]

Case(s) referred to:
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***
China South Sea Bank Ltd v. Tan Soon Gin [1990] 2 WLR 56 (PC) ***(refd)***
Cuckmere Brick Co Ltd & Anor v. Mutual Finance [1971] 1 Ch D 949 ***(refd)***
Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 ***(refd)***
Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 57(a)
Rules of the High Court 1980, O. 1A, O. 14, O. 18 r. 19

For the plaintiff - CL Wong; M/s Skrine
For the defendant - Keith Kwan; M/s Syarikat Kam Woon Wah

Reported by Rose Aziz

JUDGMENT

Abdul Wahab Said J:
The defendant filed an appeal in encl. 77 against the Senior Assistant Registrar's decision on 9 December 2003 (encl. 64) allowing the plaintiff's application for the defendant's counterclaim to be struck out under O. 18 r. 19 Rules of the High Court 1980 on the grounds *inter alia* that it discloses no reasonable cause of action, is *scandalous*, *frivolous* or *vexatious* and an abuse of the process of this court.

The plaintiff had earlier obtained a summary judgment under O. 14 of the Rules of the High Court against the defendant on 31 May 2002. The plaintiff's claim is in respect of banking facilities granted to the defendant. The facilities were secured by *inter alia* a charge of shares executed by the defendant in favour

of the plaintiff bank. The defendant alleged that the plaintiff owed him a duty to sell the charged shares when the market was good so as to capitalise on the possibility that the sale proceeds will cover the outstanding facilities. The defendant on 21 February 2002 made a counterclaim on this. The defendant appealed to the judge in chambers against the granting of the O. 14 application. I dismissed the appeal on 2 October 2003. The defendant's appeal in the Court of Appeal is still pending.

The defendant filed an application under O. 14 of the Rules of the High Court 1980 for his counterclaim against the plaintiff. The application was dismissed by the court. The plaintiff promptly filed its application to strike out the counterclaim after the disposal of the O. 14 appeal. In their arguments, the plaintiff's learned solicitors cited the case of *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd* [1996] 1 CLJ 393 where it was stated that in order for the court to conclude that this is a plain and obvious case for striking out, the court must be satisfied that there was no cause of action. The approach to be taken should be the same as in O. 14 applications. This is by virtue of the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14.

To the defendant's allegation that the defendant owed him a duty to sell the charged shares when the market was good, the plaintiff said that as mortgagee and chargee the plaintiff owed no duty of care to the defendant as to the timing of the sale of shares. Further, the position in contract under the memorandum of charge namely cl. 4.2, 5.1 (c) and 15.1 is that the defendant himself had agreed and recognised that the plaintiff, as mortgagee of the shares, owed no duty to the defendant to sell the shares in question. The plaintiff cited the cases of *China South Sea Bank Ltd v. Tan Soon Gin (alias George Tan)* [1990] 2 WLR 56 (PC) and *Keppel Finance Ltd v. Phoon Ah Lek* [1994] 3 MLJ 26 to support this argument.

The whole of the defendant's counterclaim was premised on two letters, one from the plaintiff's Singapore solicitors dated 27 October 1998 and another dated 21 February 2000, both saying that the plaintiff is at liberty to exercise its rights against the securities if the defendant fails to pay or comply with terms and conditions in order that the plaintiff will withhold action. The plaintiff said that the defendant has no cause of action based on the two letters. They are letter of demand and a without prejudice letter regarding the conditions for withholding legal action.

The defendant, in reply to issues on the position under the memorandum of charge and that the plaintiff as chargee owes no duties to the defendant in the conduct of the shares, raised the matter about the involvement of the 3rd

party. The defendant said that the plaintiff has failed to bring forth the parties involved as witnesses, namely the plaintiff's then general manager, who had requested the assistance of the defendant in allowing the said 3rd party, Tan Sri Wee Boon Ping to utilise a portion of his facility with the plaintiff. The defendant also said that should the loan have been a personal nature, the defendant would not have required a sectionalisation of his facility, whilst the plaintiff also requiring Tan Sri Wee Boon Ping to sign a personal guarantee for the said sums.

The defendant said that by virtue of the fact that the Tan Sri Wee Boon Ping is allowed usage of the facility and there is further requirement of a further separate guarantee by Tan Sri Boon Ping, the terms of the said Memorandum have been varied and/or overridden by further terms and conditions upon which the plaintiff now bound ie, plaintiff could be required to act in the interest of the defendant.

The defendant alleged that the plaintiff's duty of care to which they owe to the appellant does not merely fall within the four corners of the said memorandum of charge, but extend beyond, ie, to carry out the mitigation of losses and also to liquidate the said shares in 1998 when the share market was not at such a depressed position. The plaintiff was said to have not only failed to fulfill its duty of care but has also been negligent in the carrying out of the duties.

Having heard the submissions of learned counsels from both sides, I dismissed the defendant's appeal with costs. My decision is premised on the following grounds.

The essence of the defendant's case is that the plaintiff owes him a duty to sell the charged shares when the market was good so as to capitalise on the possibility that the sale proceeds will cover the outstanding facilities. However, I agree with the plaintiff's counsel that the defendant is vague about the dates when he alleged the charged shares should be sold. The defendant has not adduced any evidence of the market value of the charged shares on any specified date.

The relevant provisions of the memorandum of charge read as follows:

Clause 4.2

This security is to be in addition to, and without prejudice to, any other security which you may now or subsequently hold in respect of the Total Indebtedness or any part thereof. You may at any time and without reference to me/us give up, deal with, vary, exchange or abstain from perfecting or enforcing any other such security or securities at any time

a and discharge any party to them or any of them, and realise such security or securities or any of them as you think fit without in any way affecting or prejudicing the security created and/or evidenced by this Memorandum.

Clause 5.1(c)

b I/We hereby covenant and undertake with you that during the continuance of the security constituted by this Memorandum I/We will ... not hold you liable as mortgagee in possession or otherwise for any loss of any nature whatsoever in connection with the securities including any loss howsoever occasioned pursuant to your exercise of the powers of sale conferred
c herein or otherwise ...

Clause 15.1

You are at liberty, but not bound, to resort for your own benefit to any other means of obtaining payment or securing performance of my/our
d obligations hereunder at any time and in any manner or order you think fit without affecting this security. You may exercise and enforce your rights under this Memorandum before resorting to other means of obtaining payment or securing performance or after such means have been resorted to in respect of any balance due or outstanding liabilities or obligations
e and, in the latter case, without entitling me/us to any benefit from such other means so long as any sum, liability or obligation remains due owing or payable or outstanding (whether actually or contingent) from or by me/us to you.

I find that the plaintiff as mortgagee and chargee of the shares owes no duty
f of care to the defendant as to the timing of the sale of the shares. In *Keppel Finance Ltd v. Phoon Ah Lek* the court held that the defendant's contention that the plaintiff finance company was negligent by not selling the shares when they first fell below the 154% margin, in which case the amounts realised would have been sufficient to repay the sum owed in full did not constitute a
g triable issue for the purposes of an order 14 application. The rationale of this principle can be seen in these words: " ... No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline."

h All these provisions clearly gave the plaintiff the right to determine when it chooses to sell the security to realise the outstanding amount. This is the contractual rights accorded to the plaintiff to determine. The defendant however, could demand the shares be sold and this must be heeded by the plaintiff. Plaintiff had earlier sold the shares on the instruction of the
i defendant.

Further, in *Cuckmere Brick Co Ltd & Anor v. Mutual Finance* [1971] 1 Ch D 949, it was held that a mortgagee is not a trustee of the power of sale and that once the power of sale has accrued he is entitled to exercise it for his own purposes and sell as and when he chooses to do so. This position was reiterated in the *China South Sea Bank* case *(supra)*.

I find that the two letters dated 27 October 1998 and 21 February 2000 cannot be the source from which the plaintiff's claim is based on. It is normal for letters of demand to contain a caution that the plaintiff will enforce security if the amount is not paid. It does not give rise to a cause of action. Further, there is no evidence that the defendant is negligent in any way or has failed to fulfill any obligations, where the charged shares are concerned. I believe the plaintiff had done all that is necessary in disposing of the security. Some of the pledged shares were sold on the instructions of the defendant himself earlier and the balance of the shares had been disposed of on the stock exchange after I had dismissed the defendant's appeal against the summary judgment. The issue had been raised in the O. 14 proceedings filed against the defendant in which I had found that there were no triable issues and I had granted summary judgment in favour of the plaintiff. I adopt the principles enunciated in the Court of Appeal case of *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634. In this case, the principles applicable in O. 14 applications had been held to be applicable in cases of striking out under O. 18 r. 19. It was stated in that case that:

> Indeed, in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit (see *Eng Mee Ong & Ors v. Letchmanan* [1979] 2 MLJ 212). But having said the foregoing, we are well aware that it is allowable even at an interlocutory stage for the court to examine affidavit evidence and to come to certain findings where 'assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thus rendering the issue not triable.

For this very reason, I find that the issues raised by the defendant, about the involvement of the 3rd party and the alleged consequential variation in terms of the memorandum of charge is lacking in precision and inconsistent with undisputed contemporaneous documents. The defendant had raised as a preliminary objection that the plaintiff's application is flawed because the plaintiff ought not to have included the word "and" between limbs (a) and (b) of O. 18 r. 19 of the Rules of the High Court. The defendant himself has not complied with the procedure laid down in s. 57(a) of the Legal Profession

Act regarding preliminary objections. It is not an objection on the merits and I need not ponder further on it. Further, O. 1A of the Rules of the High Court 1980 clearly says that: "In administering any of the rules herein the Court or Judge shall have regard to the justice of the case and not only to the technical non-compliance herein.

For all the above reasons the defendant's appeal was dismissed and the counterclaim struck out with costs.